United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7671, 76-7006

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

NECTARIOS KOUPETORIS,

Plaintiff-Appellant-Appellee,

-against-

KONKAR INTREPID CORP.,

Defendant-Appellee, Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF DEFENDANT-APPELLEE, CROSS-APPELLANT KONKAR INTREPID CORP.

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In The

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Second Circuit

Nos. 75-7671

76-7006

NECTARIOS KOUPETORIS,

Plaintiff-Appellant-Appelle,

-against-

KONKAR INTREPID CORP.,

Defendant-Appellee, Cross-Appellant.

Brief in Behalf of Defendant Appellee - Cross Appellant Konkar Intrepid Corp.

STATEMENT

Plaintiff appellant Nectarios Koupetoris (hereinafter sometimes referred to as appellant) brought suit in the United States District Court for the Southern District of New York to recover damages under the Jones Act, 46 U.S.C. 688, and the General Maritime Law of the United States or, in the alternative, under Liberian Law, to recover

damages for personal injuries he allegedly sustained on July 19, 1974 while he was employed as a seaman aboard the KONKAR INTREPID by defendant appellee, cross appellant, Konkar Intrepid Corp. (hereinafter sometimes referred to as Konkar Intrepid Corp.).

Konkar Intrepid Corp., the owner of the KONKAR INTREPID, moved to dismiss the appellant's action pursuant to Rules 12b (2) and (5) of the Federal Rules of Civil Procedure for lack of personal jurisdiction and for insufficient service of process; pursuant to Rule 12b (1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction on the grounds that the Jones Act and the General Maritime Law are inapplicable or, in the alternative, for an order pursuant to Rules 12b (3) and 56 of the Federal Rules of Civil Procedure dismissing the action on the grounds that the United States District Court for the Southern District of New York is not a convenient forum in which to litigate the action (8a).

Konkar Maritime New York Agencies, Ltd. (hereinafter sometimes referred to as New York Agencies), the New York agent of Konkar Intrepid Corp., was originally named as a defendant in the action, but suit was dismissed against it by consent of the appellant (60a).

The Honorable Milton Pollack, by opinion dated October 31, 1975 (59a),[1] and by judgment dated November 7, 1975 (99a), held that Konkar Intrepid Corp. was properly served with process and is subject to the Court's personal jurisdiction, and dismissed the appellant's complaint for lack of subject matter jurisdiction and on the alternative grounds of forum non conveniens (59a-67a, 99a).

The appellant filed his notice of appeal of the dismissal of his action to this Court on or about December 1, 1975 (B, ~~100~~a), and on December 12, 1975 Konkar Intrepid Corp. filed its notice of cross appeal from the Court's opinion and judgment insofar as the Court held Konkar Intrepid Corp. was validly served with process and is subject to the personal jurisdiction of the Court (101a).

The opinion of the Court below is reported at 402 Fed. Supp. 951 (S.D.N.Y. 1975).

FACTS

A. The evidence on the motion to dismiss

Mr. Sotiris D. Tselentis, Vice President of New York Agencies, submitted an affidavit in support of the motion for judgment (10a),[2] and also testified at a de-

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1. References are to pages in Plaintiff Appellant's Appendix.

2. The appellant's brief mistakenly claims at p.11 that Mr. Tselentis' affidavit was executed by counsel, whereas in fact Mr. Tselentis executed his own affidavit based on his personal knowledge of the facts (10a).

position pursuant to appellant's notice (68a). Konkar Intrepid Corp. submitted affidavits executed by two of its shareholders concerning its foreign ownership (47a, 48a), and an affidavit from a Greek attorney delineating the jurisdiction of the Greek courts over this foreign controversy (49a).

The appellant's asserted evidence, other than his attorney's examination of Mr. Tselentis at his deposition, consists solely of three affidavits executed by his attorney (19a, 26a, 56a). These affidavits are obviously not based on his attorney's personal knowledge and are violative of both the Federal hearsay and best evidence rules (see pages 13 and 20, infra). The appellant's claim that he was denied discovery is frivolous, because appellant was provided all discovery he properly demanded. (See pages 9 and 10, infra).

B. The allegiance of the parties

The appellant is a citizen and resident of Greece (10a). Konkar Intrepid Corp. is an alien corporation organized and existing under the laws of Liberia, and it has its office and principal place of business in Athens, Greece (10a, 11a). All outstanding shares of Kondar Intrepid Corp. are owned by C. Karpidas, Penelope Paraschis, Aliki Perrotis and Ioannis Andropoulos, who are citizens and residents of Greece (11a, 47a, 48a).

Konkar Intrepid Corp. is not licensed to do business in New York State. It does not maintain an office in New York or the United States and it has no salesmen in New York or the United States. Konkar Intrepid Corp. does not own or lease any property in the State of New York and it does not directly or indirectly solicit any business in the State of New York or derive any income from the State of New York (11a, 12a).

C. The vessel

The KONKAR INTREPID is the only vessel owned by Konkar Intrepid Corp. The KONKAR INTREPID never visited New York in 1974, which is the year of the plaintiff's asserted accident and the year suit was filed (11a). The KONKAR INTREPID called at other United States ports seven times in 1974, and twice in the first half of 1975 (98a).

The appellant's brief at page 3 erroneously claims that the KONKAR INTREPID was under charter to "Gatx Leasing Corporation." This statement is based on an affidavit executed by the appellant's attorney which is based on his recollection of the testimony of Mr. Tselentis at his deposition (36a). In fact, Mr. Tselentis testified that the vessel was chartered by Gatx Leasing and Shipping Corporation of London, and that he believed the main office of Gatx was in London (75a, 76a). There is no evidence in the record supporting the appellant's claim at page 3 of his

brief that the stock of Gatx's parent corporation is traded over the New York Stock Exchange and, in any event, we submit stock transactions involving Gatx's asserted parent are irrelevant.

D. The activities of Konkar Intrepid Corp.'s New York agent

The appellant purportedly served process on Konkar Intrepid Corp. by leaving the summons and complaint with New York Agencies (11a). New York Agencies was not Konkar Intrepid Corp.'s manager or general agent and was not authorized to accept service of process on its behalf (11a). New York Agencies retained husbanding agents on behalf of several shipowners, but it has never appointed a husbanding agent in the United States for Konkar Intrepid Corp. (11a, 85a). During 1974, New York Agencies appointed husbanding agents outside the United States on behalf of Konkar Intrepid Corp. only "once or twice" (85a).

The charter hire for the KONKAR INTREPID was paid by the charterer directly into Konkar Intrepid Corp.'s bank account at Chase Manhattan Bank in New York (78a). New York Agencies was empowered to draw against that account for the limited purposes of paying for certain of the vessel's expenses, including replacement of engine parts and provisions (83a, 94a). New York Agencies and Konkar Intrepid Corp.'s Greek agent forwarded funds to the vessel's Master to cover miscellaneous expenses (83a, 96a). Mr. Tselentis testified

that he presumed the Master may have used a portion of the expense money to give members of the crew an advance on their wages (83a). However, the crew's wages were paid by Konkar Intrepid Corp.'s Greek agent in Piraeus, which also signed on the vessel's crew, handled the accounting and paid many of the vessel's expenses (94a, 95a).

Expenses for water and crew's expenses, and expenses such as medical attention and repatriation for the crew, were not paid out of Konkar Intrepid Corp.'s New York bank account, but were deducted from the charter hire by the charterer. (91a, 92a). The charterer paid for fuel (93a), and directed the trading routes of the vessel (83a, 95a). New York Agencies had no connection with cargo transactions, and had no connection with the KONKAR INTREPID's trading routes (95a). Accordingly, the appellant is mistaken when he alleges at page 3 of his brief that New York Agencies Ltd. "expended such expenses of the vessel as the shipowner was obligated to pay."

E. The asserted New York mortgage

At page 5 of his brief, the appellant erroneously alleges that Mr. Tselentis denied at his deposition that the KONKAR INTREPID was subject to a mortgage. In fact, the appellant's attorney never asked Mr. Tselentis if the KONKAR INTREPID was subject to a mortgage. The appellant's attorney asked on two occasions if the KONKAR INTREPID was subject to a mortgage at Chase Manhattan Bank, and Mr. Tselentis correctly and forthrightly replied that she was not (89a, 97a).

The appellant erroneously alleges at page 5 of his brief that the KONKAR INTREPID was subject to a mortgage at Chase Manhattan Bank. His asserted authority for that statement is the hearsay affidavit of his attorney which alleges that he reviewed certain records belonging to the Republic of Liberia and allegedly determined that the KONKAR INTREPID is subject to a mortgage at Mitsui Bank (34a). Accordingly, the appellant not only misquoted Mr. Tselentis, but he also misquoted his own attorney.

F. Appellant's employment contract and the sources of proof

The appellant executed his maritime employment agreement in Greece with the shipowner's Greek hiring agent, Konkar Shipping Agencies S.A. The appellant's employment agreement provides that Greek law applies and that Greek courts of Athens have exclusive jurisdiction over any and all disputes between the appellant and the Konkar Intrepid Corp. (12a).

The crew of the KONKAR INTREPID, including the appellant, were hired in Greece by Konkar Shipping Agencies S.A., the shipowner's Greek agent, or were signed aboard the vessel by the Master. The majority of the crew members at the time of the appellant's asserted accident are Greek citizens, and none of the vessel's crew members at that time is presently a United States citizen or resident (12a, 18a).

The appellant's accident assertedly occurred on or about July 19, 1974 while he was employed as a seaman aboard the KONKAR INTREPID (4a). The accident assertedly occurred in the navigable waters of the Port of Baltimore, Maryland (4a). The appellant was treated for his injuries at the United States Public Health Service Hospital in Baltimore, Maryland and was subsequently treated by Dr. George Berket in New Orleans, Louisiana. The plaintiff was also treated by his own physicians in Greece, Dr. Kossyfakis and Dr. Kupis (13a).

G. Appellant's unfounded claim that he was denied discovery

The appellant erroneously implies at pages 3, 6, 7 and 8 of his brief that he was denied discovery. In fact, the only discovery properly demanded by appellant was Mr. Tselentis' deposition. Mr. Tselentis was produced pursuant to appellant's notice and was fully deposed (68a). No other discovery was properly sought by appellant (B).

The appellant mistakenly claims he was denied discovery of two supposedly "significant" records which his attorney requested at Mr. Tselentis' deposition on July 23, 1975. However, his attorney was informed on July 28, 1975 that Konkar Intrepid Corp. would not produce the two documents he sought without a court order. Although more than three months thereafter elapsed before the court rendered its decision on the motion for judgment here at issue (B), the appellant's attorney failed to make a motion to compel

discovery pursuant to Rule 37 F.R.C.P. (Interestingly, during that period Konkar Intrepid Corp. filed a motion pursuant to Rule 37 F.R.C.P. to compel discovery from the appellant (B)).

Accordingly, we submit that if the appellant was denied discovery, it was because his attorney failed to properly demand it.

POINT I

NEW YORK HAS INSUFFICIENT CONTACTS WITH KONKAR INTREPID CORP. TO SUBMIT IT TO THE PERSONAL JURISDICTION OF NEW YORK COURTS

It is submitted that the District Court below improperly held that Konkar Intrepid Corp. is subject to the personal jurisdiction of New York courts.

A. General Jurisdictional Standards

The appellant and Konkar Intrepid Corp. are both aliens, and diversity is therefore absent.[3] Accordingly, since the complaint alleges causes of action in admiralty, it is undecided whether the personal jurisdiction of the Court below is determined by Federal standards or by New York State standards. See Arrowsmith v. United Press International, 320 F.2d 219, 228, Fn. 9 (2d Cir. 1963) and Aquascutum of London Inc. v. SS AMERICAN CHAMPION, 426 F.2d 205, 211, Fn. 4 (2d Cir.

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3. See, e.g., Kramer v. Caribbean Mills, 394 U.S. 823, 824, n.2 (1969).

1970). However, as shown below, Konkar Intrepid Corp. has insufficient contacts with New York State to come within its standards for personal jurisdiction. Therefore, since there is "no reason to believe a 'Federal standard' would be more easily met", (Aquascutum, supra, 426 F.2d at 211, Fn. 4), we submit that the action against Konkar Intrepid Corp. should have been dismissed for lack of personal jurisdiction.

The controversy at bar involves a suit by an alien seaman against an alien shipowner to recover damages for personal injuries the seaman assertedly suffered on the high seas outside of New York's territorial waters. There is no allegation that the shipowner's acts outside New York caused injuries inside New York. Accordingly, the New York "long arm" statute (CPLR 302) does not confer personal jurisdiction over Konkar Intrepid Corp., because the appellant's asserted causes of action are wholly unrelated to the State of New York.

In New York, CPLR 301 determines whether its courts may exercise personal jurisdiction over foreign defendants in disputes unrelated to the State of New York. As interpreted by decisional law, CPLR 301 will confer personal jurisdiction over foreign corporations such as the Konkar Intrepid Corp. only if they are "doing business" within the State "not occasionally or casually, but with a fair measure of permanence and continuity". Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267 (1917).

The appellant must show that Konkar Intrepid Corp. has the requisite "minimal contacts" with New York so that the maintenance of the suit here does not offend traditional notions of fair play and substantial justice. See International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). The appellant must also show that the asserted "contacts" of Konkar Intrepid Corp. have a substantial connection with New York State. McGee v. International Life Ins., Co., 355 U.S. 220 (1957). The appellant must further show that Konkar Intrepid Corp. has purposely availed itself of the privilege of conducting activities within the State of New York, thus invoking the benefits and protections of New York's laws. Hanson v. Denckla, 357 U.S. 235 (1958).

B. The Appellant's Asserted Proof

The burden of pleading jurisdictional facts and of proving that the court has jurisdiction over a party or a cause of action rests on the plaintiff. This burden requires the appellant in the case at bar to establish "by a preponderance of the evidence" that personal jurisdiction exists over Konkar Intrepid Corp. See, e.g., Rivera v. New Jersey Bell Telephone Co., 340 F. Supp. 660, 661 (E.D.N.Y. 1972).

The appellant has not submitted one shred of reliable evidence showing any substantial contacts between Konkar Intrepid Corp. and the State of New York. He principally relies on three affidavits executed by his attorney,

who obviously has no personal knowledge concerning the business operations of Konkar Intrepid Corp. or the transactions involved in this lawsuit (19a, 26a, 56a). As conceded by the appellant at page 11 of his brief, an affidavit of counsel "is palpably insufficient, since our courts still require proof by one with knowledge and the source of knowledge stated. Dresser v. The Sandpiper, (Ca. 2) 331 F.2d 130, 143. Affidavits are required to be made on 'personal knowledge'. Federal Rules of Civil Procedure 56 (e)".

Appellant's unfounded claim at pp. 3, 6, 7 and 8 of his brief that he was denied discovery is discussed supra, at pages 9 and 10 of this brief. Konkar Intrepid Corp. has submitted affidavits of two of its shareholders which demonstrate its foreign ownership (47a, 48a), and an affidavit of an attorney admitted to the Greek bar showing that Greek courts have jurisdiction over this controversy (49a). Konkar Intrepid Corp. also submitted the affidavit and deposition of Mr. Tselentis, who is the Vice President of its New York agent, New York Agencies (10a, 68a).[4] These sworn statements and testimony are based on personal knowledge and, we submit, are the only reliable evidence before the court.

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4. Mr. Tselentis' affidavit is erroneously referred to as an affidavit of "counsel" at p.11 of appellant's brief.

C. The Applicable Law

We submit that the uncontroverted evidence submitted by Konkar Intrepid Corp. shows that it has no permanent connection with New York, and that New York has insufficient interest in the parties and this dispute to exercise personal jurisdiction over Konkar Intrepid Corp.

In International Milling Co. v. Columbia Transportation Co., 292 U.S. 511, 520 (1934), the Supreme Court announced that the interest of the forum State in protecting its residents "is a fact of high significance" in determining whether the State can properly exercise jurisdiction over a foreign carrier in a cause of action unrelated to the forum. The appellant in the case at bar is a Greek citizen and resident who has spurned the courts of his domicile in a classic case of forum shopping. He bears the aspect of "an impertinent intruder" in the New York courts, and we submit that New York has no interest in him or his imported foreign dispute. International Milling Co, supra, 292 U.S. at 519; Scanapico v. Richmond, Fredericksburg & Potomac R. Co., 439 F.2d 17, 27 (2d Cir. 1970).

Moreover, New York has insufficient interest in the business activities of Konkar Intrepid Corp. to exercise personal jurisdiction over it.

Most importantly, Konkar Intrepid Corp. does not directly or indirectly solicit any business within the State of New York, and Konkar Intrepid Corp. derives no income from the

State of New York (11a, 12a). Konkar Intrepid Corp.'s only vessel, the KONKAR INTREPID, did not call in a New York port in 1974, which is the year of the appellant's accident and the year suit was filed (11a).

Therefore, cases such as Bryant v. Finnish National Airlines, 15 N.Y. 2d 426 (1965) and Frummer v. Hilton Hotels International, 19 N.Y. 2d 533 (1967), cert. den. 389 U.S. 923 (1968) are inapplicable, because they involve the New York "solicitation plus" rule, which provides that "...once solicitation (of business) is found in any substantial degree very little more is necessary to a conclusion of 'doing business'." Aquascutum of London Inc. v. SS AMERICAN CHAMPION, 426 F.2d 205, 211 (2d Cir. 1970). Accordingly, we submit that the appellant's showing of "skimpy" contacts between Konkar Intrepid Corp. and New York fails to meet the test of "doing business." See Aquascutum, supra, 426 F.2d at 212.

Konkar Intrepid Corp. is a Liberian corporation having its principal place of business in Athens, Greece (10a, 11a). Konkar Intrepid Corp. is not licensed to do business in the State of New York. It has no office in New York or the United States. It does not own or lease any real property in the State of New York (11a). The appellant executed his maritime employment agreement in Greece (12a). All outstanding shares of Konkar Intrepid Corp. are owned by Greek citizens and residents (11a, 47a, 48a).

Notwithstanding this almost complete lack of nexus between Konkar Intrepid Corp. and New York State, the District Court below found that Konkar Intrepid Corp. was subject to its personal jurisdiction. The Court based its jurisdictional finding on the New York business activities of New York Agencies on behalf of Konkar Intrepid Corp., coupled with the fact that Konkar Intrepid Corp. maintains a New York bank account and assertedly borrows money in New York (60a).

We submit that the New York activities of New York Agencies on behalf of Konkar Intrepid Corp. were mechanical, and were insufficient to vest the Court below with personal jurisdiction over Konkar Intrepid Corp. Charter hire for the KONKAR INTREPID was paid by the charterer directly into the Konkar Intrepid Corp.'s account at Chase Manhattan Bank (78a). New York Agencies was empowered to draw against that account for the limited purposes of paying for certain of the KONKAR INTREPID's expenses, including stores and provisions (83a, 94a). New York Agencies and Konkar Intrepid Corp.'s Greek agent also forwarded money to the vessel's Master to cover miscellaneous expenses (83a, 96a). Mr. Tselentis testified that he presumed the vessel's Master occasionally would use a portion of the expense money to give members of the crew an advance on their wages (83a). However, contrary to the finding of the court below, the crew's wages and many other expenses were paid by Konkar Intrepid Corp.'s Greek agent in Piraeus, which also signed on the crew and handled the accounting for Konkar Intrepid Corp.(95a).

It is uncontroverted that New York Agencies exercised no discretion in these tasks, and that it passed the money to Konkar Intrepid Corp. as soon as possible through monthly accountings (11a, 12a, 86a, 97a).

Mr. Tselentis also testified at his deposition that New York Agencies has never retained a husbanding agent on behalf of Konkar Intrepid Corp. in the United States. In 1974, the year of the plaintiff's asserted accident and the year suit was filed, New York Agencies appointed a husbanding agent outside the United States on behalf of Konkar Intrepid Corp. only "once or twice" (85a).

In Grammenos v. Lemos, 457 F.2d 1067 (2d Cir. 1972), this Court held that the delivery of a summons and complaint to a foreign shipowner's New York "sub-agent" was insufficient service of process in circumstances similar to those at bar. The Court did not reach the question of personal jurisdiction over the foreign shipowner (See p.1072), but if it had, we submit it clearly would have held such jurisdiction was lacking. The Court stated at p. 1072:

> "It has been held that normally, the person in charge of the activities in the state which are the basis for the conclusion that the defendant is present is the managing agent for purposes of service. See Bomze v. Nardis Sportswear, 165 F.2d 33 (2d Cir. 1948)."

In Grammenos, the New York "sub-agent" (Triton) conducted the following listed activities on behalf of the shipowner (Nile):

> "Triton does solicit some business for Nile, but it is not clear whether this takes place in New York. Nothing indicates that Nile is associated or named in any way in connection with Triton's office or that Triton does business only for Nile. Triton does have bank accounts in New York and an office there. It collects and disburses money for Nereus accounts, but apparently does not exercise discretion in these tasks and does not enter into contracts for Nile. The lower court held, without elaboration, that Nile was not present in New York." 457 F.2d at p.1072.

In holding that Triton was not a "managing agent" for service of process within the meaning of Rule 4(d)(3) F.R.C.P., The Court stated further at page 1073:

> "Triton is the sub-agent for the whole United States, and it does operate a running account for Nereus ships. Its activities are therefore somewhat closer to those of a general agent than were those of the corporation in Amicale.[5] But Triton is in essence a collection agency, and monies are passed on to the principals as soon as possible. Triton does not exercise discretionary power; it is a sub-agent of Nile in one area for certain specific tasks, but is not the entity with overall authority for Nile's activities in the United States." (Footnote added).

See also George H. McFadden & Bros. v. M/S SUNOAK, 167 F. Supp. 132 (E.D. Va., 1958).

We submit that the New York activities by New York Agencies, in which "it exercised no discretion" (12a), are insufficient to subject Konkar Intrepid Corp. to the personal jurisdiction of New York courts. We further submit that, in these circumstances, where Konkar Intrepid Corp. has neither solicited business nor derived income from New York, it will

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5. Amicale Industries, Inc. v. S.S. Rantum, 259 F. Supp. 534 (D.S.C. 1966).

raise serious constitutional doubts if Konkar Intrepid Corp. is held subject to personal jurisdiction in New York. See Aquascutum of London, Inc. v. SS AMERICAN CHAMPION, 426 F.2d 205 (2d Cir. 1970), where this Court held that "mechanical" activities by a New York agent are insufficient to vest New York courts with personal jurisdiction over the principal, even where, unlike here, the principal derives substantial income from New York and the agent solicits business in New York on the principal's behalf. In discussing the inapplicability of such cases as Frummer v. Hilton Hotels International, supra, 19 N.Y.2d 533, this Court stated at 426 F.2d p.212:

> "(W)e do not think the Court of Appeals meant that when a foreign corporation's activities in New York in addition to soliciting orders amount to nothing more than paying persons to perform essentially mechanical tasks for it, it is to be regarded as "doing business" here. To hold otherwise would raise constitutional doubts sufficiently serious that we should avoid such a construction in the absence of clear indication from the New York courts. See Farrell v. Piedmont Aviation, Inc., 411 F.2d 812, 817 (2 Cir.), cert. denied, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969), citing cases." (Footnote omitted).

The Court below found that the KONKAR INTREPID was subject to a mortgage at a New York bank. We submit that this finding was based on unreliable and inadmissable evidence.

At the deposition of Mr. Tselentis, the appellant's attorney asked twice if the KONKAR INTREPID was subject to a mortgage at Chase Manhattan Bank, and Mr. Tselentis replied that she was not (89a, 97a). The appellant's attorney never

asked Mr. Tselentis if the KONKAR INTREPID was subject to a mortgage at any other bank. Therefore, when the court below held that the KONKAR INTREPID was the subject of a mortgage at a New York bank, it was relying solely on the affidavit of the appellant's attorney in which he claimed that he had reviewed records at the office of the Liberian Deputy Commissioner for maritime affairs and assertedly found that there was a mortgage executed on the KONKAR INTREPID at Mitsui Bank in New York City (34a).[6] We submit that the affidavit of appellant's attorney violates the best evidence rule as well as the hearsay rule, and that it should not have been considered by the court below. (See Federal Rules of Evidence, Rules 1004 and 802).

However, even assuming arguendo that the KONKAR INTREPID is subject to a mortgage at Mitsui Bank, we submit the District Court improperly found Konkar Intrepid Corp. is subject to the jurisdiction of a New York court.

In Hastings v. Piper Aircraft Corp., 274 App. Div. 435 (1st Dept. 1948), the New York Appellate Division held that a foreign corporation was not subject to jurisdiction in New York in similar circumstances. The defendant in Hastings was a Pennsylvania corporation having its principal place of business in Pennsylvania. Like the Konkar Intrepid Corp., the defendant was not licensed to do business in New York and had no employees soliciting business for it in New York.

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6. At p.8 of his brief, the plaintiff misquotes his attorney's affidavit by claiming the mortgages are at Chase Manhattan Bank, rather than at Mitsui Bank.

The defendant in Hastings maintained a substantial and active bank account in a New York bank, and it occasionally borrowed money from the bank after negotiations conducted in New York. However, unlike Konkar Intrepid Corp., the defendant in Hastings maintained two telephone numbers in New York and derived New York income by shipping goods to New York buyers on transactions completed elsewhere. The Court held that these transactions were not sufficient for the defendant to be doing business pursuant to section 229b of the Civil Practice Act, the predecessor of CPLR 301. With respect to the bank accounts, the court stated at 274 App. Div. 438:

> "A nonresident manufacturer such as defendant does not conduct business in the jurisdictional sense in the absence of continuous and systematic solicitation within the State merely because it delivers or sends goods into the State to local buyers on sales transactions completed elsewhere (see International Shoe Co. v. Washington, 326 U.S. 310; Holzer v. Dodge Brothers, 233 N.Y. 216; Tauza v. Susquehanna Coal Co., 220 N.Y. 259). Nor does the maintenance of a deposit in a local bank by the nonresident defendant itself constitute the doing of business by the depositor in this State. While the borrowing of money from a local bank after negotiations conducted here by the officers or representatives of a foreign corporation is a transaction that constitutes the doing of business in New York as to the lender (Chaplin v. Selznick, 293 N.Y. 529, 538), we think that such transaction is not the jurisdictional conduct of business on the part of the borrower and does not warrant a holding that defendant is present within this jurisdiction, especially where the loan is intended for use in another State (see Bank of America v. Whitney Bank, 261 U.S. 171; cf. Greenberg v. Lamson Brothers Co., 273 App. Div. 57)."

See also Fremay Inc. v. Modern Plastic Machinery Corp., 15 A.D. 2d 235 (1st Dept., 1961); Kornbluh, Sirkin, Ritter & Co., v. Keith Enterprises, Inc., 51 Misc. 2d 1053 (Civ. Ct., N.Y. 1966).

The cases cited above make it clear that significant solicitation of business by a foreign defendant in New York is a substantial contact with the State, and that very little more is required to subject the foreign defendant to the personal jurisdiction of New York courts. However, where, as here, the foreign defendant has not solicited business in New York, minor mechanical and non-discretionary tasks performed by its agent within the state are insufficient to render the foreign defendant subject to the State's personal jurisdiction.

Accordingly, it is respectfully submitted that the appellant in the case at bar has failed to prove Konkar Intrepid Corp. is "doing business" in New York pursuant to CPLR 301, and that the court below should be reversed insofar as it held that Konkar Intrepid Corp. was subject to its personal jurisdiction.

POINT II

THE ACTION SHOULD HAVE BEEN DISMISSED AGAINST KONKAR INTREPID CORP. FOR INSUFFICIENT SERVICE OF PROCESS

Service of process on Konkar Intrepid Corp. was purportedly accomplished by delivery of the summons and complaint to New York Agencies pursuant to Rule 4(d)(3) F.R.C.P., which provides that process may be served as follows:

> Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

As revealed in Point I, supra, the New York business activities of New York Agencies were insufficient to make New York Agencies the managing or general agent of Konkar Intrepid Corp. for purposes of service of process. Accordingly, since New York Agencies was not otherwise authorized to accept service on behalf of Konkar Intrepid Corp.(11a), we submit that the Court below should have dismissed the appellant's action for insufficient service of process. See Grammenos v. Lemos, 457 F.2d 1067, 1072 (2d Cir. 1972), which is discussed supra at pp. 17 and 18; see also, Thyssen Steel Corp. v. Federal Commerce and Navigation Co., 274 F. Supp. 18, 20 (S.D.N.Y. 1967); George H. McFadden and Bros. v. M/S SUNOAK, 167 F. Supp. 132 (D.C. Va., 1958).

Accordingly, we submit that the appellant's action against Konkar Intrepid Corp. should have been dismissed for insufficient service of process.

POINT III

NEITHER THE JONES ACT NOR THE GENERAL MARITIME LAW IS APPLICABLE TO THE CASE AT BAR. ACCORDINGLY, SINCE NO DIVERSITY EXISTS, THE ACTION WAS PROPERLY DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

We submit that the Jones Act and the General Maritime Law are inapplicable to this foreign controversy, and that the court

below correctly dismissed this matter for lack of subject matter jurisdiction.

In Lauritzen v. Larsen, 345 U.S. 571 (1953), the Supreme Court discussed the relevant factors to be considered in determining the applicability of the Jones Act to suits involving foreign seamen and foreign shipping interests. In Lauritzen, the plaintiff was an alien seaman who had signed articles of employment in New York for service aboard a Danish flag vessel owned by a citizen of Denmark. The plaintiff suffered personal injuries while the vessel was in Havanna, Cuba, and subsequently instituted an action in New York based on the Jones Act.

On appeal, the Supreme Court discussed seven factors which must be considered in determining the applicability of the Jones Act to suits involving alien seamen and alien shipowners. It is submitted that these factors weigh in favor of this Court affirming the dismissal of this action, as follows:

1. The place of alleged wrongful act- The appellant's alleged injuries assertedly occurred in the navigable waters of Maryland. However, as pointed out in Lauritzen, the place of injury is insignificant in maritime law, and it is more appropriate to apply the law of the flag than the law of the place where the injury occurred: "...the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag." Lauritzen v.

Larsen, 345 U.S. 571, 584 (1953). See also Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), where the Jones Act and the General Maritime Law were held to be inapplicable to an injury suffered by a foreign seaman aboard a foreign flag vessel, even though the injury assertedly occurred in the territorial waters of New Jersey. The Supreme Court stated at 358 U.S. 384:

> "To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would not only be an onerous but unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstances of the place of injury."

2. The law of the flag- The KONKAR INTREPID is registered under the Liberian flag (10a). However, the appellant's employment contract provides that Greek law will apply to all claims arising out of appellant's employment and that such claims will be adjudicated exclusively in Greek Courts (12a). Accordingly, the applicable law is the law of Greece rather than the law of Liberia. However, irrespective of whether Greek or Liberian law applies, it is clear United States law is inapplicable. Accordingly, the "law of the flag" supports the District Court's dismissal of the appellant's action.

3. The allegiance or domicile of the injured party- The appellant is a citizen and a resident of Greece (10a).

4. The allegiance of defendant shipowner- Konkar Intrepid Corp., the owner of the KONKAR INTREPID, is a Liberian corporation with its office and principal place of business in Greece. It has no office in the United States (10a, 11a).

5. The place where the employment contract was executed- The appellant's employment contract was executed in Greece (12a).

6. The accessibility of a foreign forum- The appellant is a citizen and a resident of Greece (10a). Konkar Intrepid Corp. is amenable to suit in Greece (49a) and, should the dismissal of this action be affirmed, it will agree not to raise any defenses there based on laches or any statutes of limitation if suit is commenced there within 90 days of the dismissal.

7. The law of the forum- As is demonstrated in Point I, supra, Konkar Intrepid Corp. is not doing business in the State of New York. This lawsuit involves a foreign transaction between foreigners occurring aboard a foreign flag vessel which only incidentally happened to be in United States waters. Accordingly, there is no basis for the application of United States law. See Romero v. International Terminal Operating Co., Inc., 358 U.S. 354 (1959).

In Romero v. International Operating Co., Inc., supra, the Supreme Court held the factors listed in Lauritzen, supra, as relevant in determining Jones Act jurisdiction should also be considered in determining whether the United States Courts have jurisdiction over claims based on the General Maritime Law. Accordingly, we submit the court below properly dismissed the appellant's claims here based on the General Maritime Law.

See also Dassigienis v. Cosmos Carriers & Trading Corp., et al., 442 F.2d 1016 (2d Cir., 1971); Frangiskatos v. Konkar Maritime Enterprises, S.A., 471 F.2d 714 (2d Cir., 1972); Scognamiglio v. Home Lines, 246 F. Supp. 605 (S.D.N.Y. 1965).

Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), is clearly distinguishable from the case at bar. In Rhoditis, the Supreme Court held that the Jones Act applied to a foreign seaman's claim against a Greek shipowner where the shipowner's majority shareholder was a permanent resident of the United States and the shipowner's largest office and base of operations was in New York.

In the case at bar, it is uncontroverted that Konkar Intrepid Corp. does not have an office in the United States, and that its principal office and base of operations is in Greece (10a, 12a).

Bartholomew v. Universe Tankerships, Inc., 263 F.2d 437 (2d Cir., 1959) is also clearly distinguishable from the case at bar. In Bartholomew, the Court of Appeals held that

the Jones Act and the doctrine of unseaworthiness applied to a foreign seaman's claim against a Liberian corporate shipowner.

The Court in Bartholomew, supra, at 440, 441 declared that the test to determine if the Jones Act is to be applied in a particular case is whether or not there are "substantial contacts" between the plaintiff, the shipowner and the United States. The Bartholomew Court enumerated the contacts listed below:

All the corporation's stock was indirectly owned by citizens of the United States; all the corporation's officers were citizens of the United States; the corporation's principal place of business was in New York City; articles for the voyage were signed in the United States; the plaintiff was living in New York City and the incident took place in the territorial waters of the United States.

It is submitted there is no basis whatever for invocation of the Jones Act or the General Maritime Law in the case presently before the Court. Therefore, since the appellant and Konkar Intrepid Corp. are both aliens, diversity is absent,[7] and this action was properly dismissed for lack of subject matter jurisdiction.

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7. See e.g., Kramer v. Caribbean Mills, 394 U.S. 823, 824, n. 2 (1969).

POINT V

EVEN ASSUMING ARGUENDO THAT SUBJECT MATTER JURISDICTION EXISTS, THIS ACTION WAS PROPERLY DISMISSED BASED ON THE DOCTRINE OF FORUM NON CONVENIENS.

The appellant's attorney has imported this litigation into New York in disregard of every established principle relating to the appropriate and convenient choice of forum. New York has no connection with this controversy and it is an unreasonable and unwarranted imposition upon this Court and upon the litigants for the appellant's attorney to attempt to transport this foreign controversy into the United States. See Noto v. Cia Secula di Armanento, 310 F. Supp. 639 (S.D.N.Y. 1970), at p.649.

It is submitted this action was properly dismissed based on the doctrine of forum non conveniens.

The landmark decision discussing the doctrine of forum non conveniens is Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). In Gulf Oil, the Supreme Court reviewed the factors it considered significant in determining whether the forum Court should retain or dismiss an action. As listed at pages 508-509 of the decision, these factors include:

1. The interests of the litigants, including:

a) relative ease of access to sources of proof;

b) availability of compulsory process for attendance of unwilling witnesses;

c) the cost of obtaining attendance of willing witnesses;

d) the possibility of a view of the premises, if a view would be appropriate to the action;

e) [illegible]ceability of judgments;

f) whether the plaintiff's choice of forum will vex, harass or oppress the defendant by inflicting unnecessary trouble and expense upon him.

2. The interests of public, including:

a) whether there is sufficient local public interest to impose jury duty upon the people of a community which has no relation to the litigation;

b) the congestion in the forum Court;

c) whether the forum Court will be forced to interpret and apply foreign law;

d) the advisability of litigating the case in a forum that is familiar with the law that must govern the case.

It is submitted these factors weigh heavily in favor of dismissal of this case.

Clearly, the private and public interests are best protected by litigating this case in Greece, where most important sources of proof are located. The appellant is a citizen and resident of Greece (10a). Konkar Intrepid Corp.'s office and principal place of business is in Greece (10a, 11a), and the appellant was treated for his alleged injuries by two physicians in Greece,

by the United States Public Health Service Hospital in Baltimore and by a physician in New Orleans (13a). None of his fellow crew-members is a citizen of the United States and the majority of the crew members are Greek citizens and residents. No compulsory process is available in New York to compel these crew members or the treating physicians to appear here for trial.

Even if these witnesses were willing to testify, it would be an exorbitant expense to transport them from Greece to New York. A view of the premises (the vessel) would be impracticable in New York, because it does not appear the vessel will ever be in New York.

Moreover, the United States has no connection with this dispute. It is an unnecessary imposition on the District Court, which is already heavily burdened with cases properly before it, to attempt to compel it to interpret and apply foreign law to a foreign dispute involving non-domiciliary aliens. As Judge Weinfeld stated in Noto v. Cia. Secula di Armanento, 310 F. Supp. 639, 649 (S.D.N.Y., 1970):

> "The doctrine of forum non conveniens protects not only the immediate defendant from harassing and vexatious litigation, but also other ligi-gants and the community at large from unwarranted imposition upon the local courts' jurisdiction."

In Fitzgerald v. Westland Marine Corp., 369 F.2d 499, (2d Cir., 1966), the United States Court of Appeals for the Second Circuit dismissed a foreign seaman's complaint against

a foreign shipowner on the ground of forum non conveniens, stating at pages 501-502:

> "We are moved, however, by the very compelling reason for dismissing the actions on the ground of forum non conveniens. Among the criteria elucidated by the Supreme Court in the Gilbert case as bearing on the question of dismissal, are the ease of access to sources of proof, the availability of compulsory process and the costs of obtaining willing witnesses. * * * Nearly all of the witnesses whose testimony would be relevant to this question, however, are in Japan. No process to compel their testimony at a trial in New York is available; and, the cost of bringing willing witnesses here to testify is exorbitant."

The appellant makes the unsupported argument at pp. 6 and 17 of his brief that Greek courts would not apply the Jones Act and the General Maritime Law to his alleged claims. This argument is entirely beside the point. As this Court held in Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1975), cert. denied _____ U.S. _____ 44 L.W. 3398 (1976):

> "(A) district court has discretion to dismiss an action under the doctrine of forum non conveniens, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. Canada Malting Co., Ltd. v. Paterson Steamships. [Supra] ... A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, including the choice of law."

See also, Frangiskatos v. Konkar Maritime Enterprises, 353 F. Supp. 402 (S.D.N.Y., 1972), aff'd. 471 F.2d 714 (2d Cir. 1972); Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281

U.S. 515 (1930); Canada Malting Co., Ltd. v. Paterson Steamship Ltd., 285 U.S. 413 (1932); Koziol v. The Fylgia, 230 F.2d 651 (2d Cir., 1956); Dassigienis v. Cosmos Carriers & Trading Corp., et al., 442 F.2d 1016 (2d Cir., 1971); Hatzoglou v. Asturias Shipping Company, S.A., 193 F. Supp. 195 (S.D.N.Y., 1961); Noto v. Cia. Secula di Armanento, 310 F. Supp. 639, 649 (S.D.N.Y., 1970).

Konkar Intrepid Corp. submits that the private interests of the litigants and the public interests of the United States would be better served by litigating this case in Greece. The appellant will suffer no prejudice by litigating in his homeland, because most important sources of proof are located in Greece, and Konkar Intrepid Corp. will appear there and waive any defenses based on laches or statutes of limitation.

It is submitted that this action was properly dismissed on the ground of forum non conveniens.

CONCLUSION

It is respectfully submitted that the decision of the District Court below should be affirmed insofar as it dismissed the appellant's action for lack of subject matter jurisdiction and on the alternative ground of forum non conveniens; and that it should be reversed insofar as it held Konkar Intrepid

Corp. was properly served with process and is subject to its personal jurisdiction.

Dated: February 13, 1976.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that on the 13 day of February, 1976, we served the foregoing Brief of the Defendant-Appellee by mailing two copies of the same to Herbert Lebovici, 15 Maiden Lane, New York, New York, counsel for plaintiff-appellant.

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